Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-1839

PEDRO ALVAREZ,
Petitioner,
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, PEDRO ALVAREZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 20, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 550 F.2d 1364 and appears in Appendix A (hereinafter cited as "App. A, B, C or D" when followed by a page number), **infra,** pp.15-33. The Court of Appeals denied a Petition for a Rehearing and a Rehearing En Banc on May 24, 1977 without opinion.

No formal opinion was entered by the District Court. Excerpts of the transcript in that Court, which includes pertinent testimony relating to "other crimes" evidence and the introduction of a written statement, are reproduced in Appendix B and C to this Petition respectively. A typewritten copy of the statement is reproduced in Appendix D to this Petition.

JURISDICTION

The Petition for Rehearing and Rehearing En Banc was denied on May 24, 1977. This Petition for Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Petitioner was tried and convicted under a one-count indictment returned in the United States District Court for the Middle District of Florida which charged a conspiracy to import, possess and distribute marijuana in Florida and New York. The questions presented here relate to evidence adduced during the trial in the District Court, notably:

(1) "Other crimes" testimony intentionally introduced

by the prosecution to put Petitioner's character in issue; and

(2) The admission into evidence of a written statement which was exculpatory of a co-defendant but inculpatory to Petitioner, and the District Court's subsequent denial of the motion for severance under F.R.Crim.P. 14.

The questions thereby arising are:

1. Whether the Court of Appeals for the Fifth Circuit correctly interpreted F.R.Evid. 404(b) in conjunction with the "harmless error" provision of F.R.Crim.P. 52(a).

2. Whether a written statement offered as exculpatory evidence by a co-defendant but which was inculpatory of and prejudicial to Petitioner as a written summary of the government's case was admissible into evidence as a prior inconsistent statement pursuant to F.R.Evid. 613(b).

CONSTITUTIONAL PROVISION AND RULES OF COURT INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

F.R.Evid. 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

F.R.Evid. 613(b) provides as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible un-

less the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d) (2).

F.R.Evid. 801(d) (1) (B) provides in pertinent part as follows:

(d) Statements which are not hearsay. A statement is not hearsay if - -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .

F.R.Crim.P. 14 provides in pertinent part as follows:

If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . .for trial together, the court may order . . .a severance of defendants or provide whatever other relief justice requires.

F.R.Crim.P. 52(a) provides as follows:

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

Petitioner and eight other defendants were indicted in the Middle District of Florida, Tampa Division, on October 10, 1975. They were charged with violating 21 U.S.C. §§846 and 963 by conspiring between January and June of 1972 to import marijuana into the United

States from Colombia, South America, possessing the marijuana and distributing it in Florida and New York.

During their trial beginning March 1, 1976, the government called William "Randy" Kilgore as a witness during its case-in-chief. Kilgore was described by the prosecutor as a co-conspirator in the allegedly successful plot to import marijuana. (App. B, p.44) As an unindicted co-conspirator, Kilgore allegedly traveled in a DC-3 airplane to Colombia with Petitioner and co-defendants John L. Wells, Jr. and Paul Rice to obtain a shipment of marijuana.

The "Other Crimes" Testimony

At the beginning of Kilgore's testimony, the prosecutor asked him if he could identify Petitioner. Kilgore did so. (App. B, p. 35) Over objection to its materiality and relevancy, the prosecutor asked Kilgore when he and Petitioner first met. Kilgore testified that his first meeting with Petitioner occurred in 1968 or 1969, some three or four years before the period encompassed by the indictment. (App. B, p. 36) The prosecutor next inquired into the manner in which Kilgore and Petitioner became associated.

"We used to trade guns for dope and . . .", Kilgore replied (App. B, p. 37).

Petitioner's counsel immediately moved for a mistrial to be declared due to the prejudice to Petitioner by the character evidence introduced by Kilgore's "other crimes" testimony. Petitioner's counsel noted that Petitioner had not put his character into issue. (App. B, p. 37) He further argued that the testimony prejudiced Petitioner in two respects. First, the other crime was too nebulous to qualify as aprior similar transaction of any probative value. Second, the exchange of "dope" for guns stated another crime, that of dealing unlawfully in firearms. (App. B, pp. 37,43) Counsel also complained that he was not warned of the "other crimes" testimony so he could prepare to deal with it. (App. B, pp. 43-44)

During a sidebar conference, the prosecutor admitted

that he knew that Kilgore would make the allegation. (App. B, p. 38) The trial court's concern, however, centered on the meaning of "dope" rather than the prejudicial impact of the testimony, its probative value on any material point or the prosecutor's motive in eliciting the testimony. (App. B, pp. 40,46-47) The trial court denied Petitioner's motion for a mistrial. (App. B, P. 47)

After the trial court made its ruling, the jury was instructed to give Kilgore's statement the weight the jury thought it should receive. (App. B, p. 47) When the prosecutor resumed questioning, he asked Kilgore to define "dope" for the jury's understanding.

> A. By, "dope," I meant that we traded for marijuana and hashhish.
>
> Q. Alright.
>
> A. I had the guns and he had the marijuana and hashhish, and I would trade him the guns for that. (App. B, pp. 49-50)

The Court of Appeals found that no need existed for the other crimes evidence to be introduced through Kilgore. That Court also chastened the prosecutor's deliberate use of the testimony as it exhibited a "lack of the appropriate sensitivity to the defendants' substantive rights." (App. A, p. 27)

Yet the Court of Appeals affirmed the conviction, finding the remarks constituted "harmless error" within F.R.Crim.P. 52(a) and **Kotteakos v. United States,** 328 U.S. 750, 764 (1946). (App. A, pp. 27-28)

Kilgore's Written Statement

During Petitioner's cross-examination of Kilgore the government produced a statement which Kilgore allegedly wrote. The prosecution tendered the original handwritten statement and a typewritten copy pursuant to the Jencks Act, 18 U.S.C. §3500. (App. C, p. 52; App. D)

During defendant Massler's cross-examination of Kilgore, Massler's counsel informed the trial court of his intention to offer Kilgore's statement in evidence as Massler's Exhibit No. 1.

Massler's counsel offered the prior written statement of Kilgore because it did not link Massler to the conspiracy, while Kilgore's trial testimony did implicate Massler. (App. C, p. 58) Thus the written statement was exculpatory of Massler and constituted a prior inconsistent statement for impeachment purposes.

Meanwhile, the writing implicated Petitioner by describing the flight to South America and the smuggling of marijuana in detail. Petitioner's counsel brought the conflict to the attention of the trial court and objected to its admission into evidence. (App. C, p. 58) Petitioner's counsel also sought an instruction to the jury for the writing to be disregarded as evidence of the guilt of Petitioner. (App. C, p. 62), as corrected by addendum certificate, App. C, p. 65)

The instruction was not given until the trial court's charge to the jury at the conclusion of all evidence. The instruction given at that point addressed the prior inconsistent statement made by Kilgore in his written statement as compared to his testimony. It did not exclude Petitioner from the statement's evidentiary scope or limit that scope to Massler. (App. A, p. 30)

The prosecutor initially objected to the admission of the writing. (App. A, p. 29) The government's objection was withdrawn later. (App. C, p. 61)

The trial court admitted the writing into evidence pursuant to F.R.Evid. 613(b) over the objection of all defendants except Massler. It was admitted with misgivings as the trial court recognized that the writing was hearsay as to the defendants other than Massler. (App. C, p. 62)

The fact that Massler and not the government offered it, however, convinced the trial court that Kilgore's written statement should be admitted as Massler's Exhibit No. 1. Petitioner immediately moved for severance, which was denied by the trial court. (App. C, pp. 63-64)

The Court of Appeals found no error in the charge on the prior inconsistent statement, the stage at which it was given or the prejudicial impact on Petitioner. (App. A, pp. 29-31)

REASONS FOR GRANTING THE WRIT

I. A CONFLICT EXISTS BETWEEN THE COURTS OF APPEALS IN REGARD TO THE PREJUDICIAL IMPACT OF OTHER CRIMES EVIDENCE AND THE PROPER REMEDY FOR SUCH PREJUDICE.

Petitioner notes at the outset that this Court has not interpreted F.R.Evid. 404(b). Since its implemention, however, Rule 404(b) has received more attention in the courts of appeals than any other rule of evidence with the possible exception of F.R.Evid. 403, a rule with a considerably broader scope. That is, the interpretations of Rule 403 deal with all of the reasons to exclude relevant evidence. Rule 404(b), meanwhile, deals with the narrow but persistent question of the proper use of other crimes evidence.

The quantity of other crimes cases in the courts of appeals is not likely to decline while - - as was the circumstance in the instant case - - the impact of other crimes testimony upon the accused is as great as it is. As is noted in 1 Wigmore, **Evidence** (2d Ed. 1940), §57:

> The deep tendancy of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendancy which cannot fail to operate with any jury, in or out of court.

Thus, Petitioner urges this Court to clarify Rule 404(b) due to the absence of controlling authority for the courts of appeals on a troublesome and recurring question of significant impact on the rights of the accused. The need for such clarification is shown by the conflicts among the courts of appeals.

A. THE COURTS OF APPEALS DIFFER OVER THE PREJUDICIAL IMPACT OF OTHER CRIMES EVIDENCE WHEN ITS USE IS UNWARRANTED.

The Court of Appeals in the case at bar found that no need existed for the injection into evidence of the testimony of Kilgore about Petitioner's alleged prior crimes. (App. A, p. 27) Yet, the Court held that the failure of Petitioner's counsel to accept a curative instruction which was offered by the trial court brought the other crimes testimony within the harmless error rule provided by F.R.Crim.P. 52(a), in light of **Kotteakos v. United States,** 328 U.S. 750 (1946).

In **United States v. Ailstock,** 546 F.2d 1285 (Cir. 1976), the Court found the relationship between the lack of a curative instruction and harmless error to have the opposite result. In **Ailstock,** a prosecution witness testified that the defendant had been imprisoned. Counsel sought no curative instruction and none was given. The Court found the absence of the curative instruction was prejudicial error which mandated reversal. **Ailstock** at 1291. Compare, **United States v. Henson,** 486 F.2d 1292, 1299-1300 n. 6, (D.C. Cir. 1973).

The conflict between the Courts of Appeals for the Fifth and Sixth Circuits illustrates two points. First, the Courts obviously differ in the impact they attribute to other crimes testimony generally since **Ailstock** required the trial judge to give a curative instruction in order to diminish the prejudicial impact of the evidence. Conversely, the Court of Appeals below put the burden on Petitioner. Second, both Courts evidently measure prejudice differently. The testimony sanctioned by the Court below is immeasurably more prejudicial than the general reference to imprisonment in **Ailstock.**

As a result of this conflict, the Courts of Appeals are applying two different standards. The Sixth Circuit is taking a **per se** approach by recognizing the inherently prejudicial impact of other crimes testimony and by requiring a curative instruction to lessen the sting of such evidence. The Fifth Circuit, meanwhile, is using the weighing approach inherent to the harmless error doctrine. Given the impact of the other crimes evidence adduced against Petitioner, he contends that the Court below erred in applying the harmless error

doctrine.

The question for this Court on the merits would be whether the unwawrranted use of other crimes evidence can be effectively weighed at all. In the alternative, the question would be whether the gross misuse sanctioned below is beyond the scope of harmless error as a matter of law. Under either analysis, this Court should eliminate this conflict in the circuits.

B. THE COURTS OF APPEALS CONFLICT ON THE PROPER REMEDY FOR PROSECUTORIAL MISCONDUCT IN THE USE OF OTHER CRIMES EVIDENCE.

The Court of Appeals below found that the prosecution deliberately interjected the needless other crimes testimony of Kilgore into the trial and that it exhibited a "lack of appropriate sensitivity to the defendants' substantive rights. We expressly disapprove it." Despite the finding of prosecutorial misconduct, Petitioner's conviction was affirmed. (App. A, p. 27)

The same result would not have obtained in the Sixth Circuit. In **United States v. Blanton,** 520 F.2d 907, 909 (6th Cir. 1975), the Court reversed and remanded the conviction when a government witness deliberately interjected inferences accusing the defendant of a recent armed robbery, thereby denying him a fair trial. By its finding that the evidence denied defendant a fair trial, the Sixth Circuit evidently placed the use of other crimes evidence on a constitutional level. Thus, the Court fashioned a **sub silentio** exclusionary rule for the use of unlawful evidence, just as this Court has fashioned an exclusionary rule for unlawful seizure of such evidence. While the constitutional question need not be reached by this Court in defining the boundaries of Rule 404(b), the exclusionary rule fashioned by the Sixth Circuit might be the only effective means of discouraging the haphazard use of such evidence. That remedy is a harsh one, but so is the alternative. See **United States v. Coppola,** 526 F.2d 764, 772 (10th Cir. 1975).

On the merits, then, this Court should fashion a consistent rule that would eliminate the anomaly of a

new trial in **Blanton** and affirmance below for the same prosecutorial misconduct.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN REGARD TO OTHER CRIMES EVIDENCE.

This Court has supervised the use of other crimes evidence in the Federal System for almost two centuries. **Boyd v. United States,** 142 U.S. 450 (1892); **United States v. Mitchell,** 2 Dall. 348 (1795). Since the Court of Appeals below has sanctioned an unusually wide departure from the course of judicial proceedings - - including the decisions of this Court - - the supervisory power of this Court should be exercised again.

The supervisory power sought by Petitioner relates to this Court's duty to ensure a fair trial. Thus, the case at bar is similar to **Marshall v. United States,** 360 U.S. 310 (1959), in which this Court ordered a new trial for prejudice arising out of newspaper accounts of the defendant's other crimes. The trial court had ruled evidence of the other crimes inadmissible, but seven jurors had read one or two news stories which described criminal acts allegedly committed by the defendant. After the seven jurors told the trial judge that they would not be influenced by the news accounts, he declined to declare a mistrial.

This Court noted that the prejudice to the defendant was "almost certain" to be as great in a news account as it would be in evidence, citing **Michelson v. United States,** 335 U.S. 469 (1948). **Marshall,** 360 U.S. at 312-313. This Court went on to note that the prejudice might be greater through a news account since "it is then not tempered by protective procedures." **Marshall,** 360 U.S. at 313.

That observation does not distinguish **Marshall** from the case at bar since "protective procedures" were not afforded Petitioner below. Indeed, the trial court instructed the jury that it could attach "only such weight as you may think it entitled to receive in relation to all the other testimony and evidence" in

the trial. (App. B, p. 47) In short, no protection was afforded.

The passage of time has not diminished the applicability of **Marshall** to the case at bar as its reasoning was cited with approval in **Murphy v. Florida,** 421 U.S. 794 (1975), which restricted **Marshall** to the federal courts. In **Murphy** this Court refused to extend the presumption of prejudice found in **Marshall** to the states as a matter of due process.

Since this Court can correct the error below in its supervisory capacity or as a matter of interpreting F.R.Evid. 404(b), Petitioner has refrained from seeking a due process determination under the Fifth Amendment. The facts of this case, however, are sufficiently gross and inappropriate to elevate this Court's attention to the constitutional threshold.

This Court has found inherent prejudice where evidence of a prior conviction is introduced into evidence when the conviction was void under **Gideon v. Wainwright,** 372 U.S. 335 (1964). **Burgett v. Texas,** 389 U.S. 109, 115 (1967). Petitioner in the case at bar was not confronted with a void conviction. But the other crimes charged against him in the testimony of Kilgore are no less inherently prejudicial since they permit him to be punished for a crime he is not charged with committing. Comment, **Other Crimes Evidence At Trial: Of Balancing And Other Matters,** 70 **Yale L. J.** 763 (1961).

Since the Court could well consider the instant case on a constitutional level, review as a matter of supervising the lower federal courts, is, **a fortiori,** appropriate. In light of the clearly abusive and inherently prejudicial use of other crimes evidence in the case at bar, such review is also mandated.

III. THE COURTS OF APPEALS CONFLICT ON THE QUESTION OF WHETHER A WRITTEN CONDENSATION OF THE GOVERNMENT'S CASE IS ADMISSIBLE IN EVIDENCE.

The Court of Appeals below gave scant attention to the question of whether Kilgore's written statement could be admitted into evidence on the motion of co-defendant Massler when it constituted a written condensation of the government's case. (App. A, pp. 29,31) The Court of Appeals did not discuss that facet of Massler's exhibit, relying instead on the trial court's interpretation of F.R.Evid. 613(b).

The trial court's interpreted Rule 613(b) to permit admission of Kilgore's writing as a prior inconsistent statement. The statement, meanwhile, was also a "neat condensation of the government's whole case against the defendant(s)." **United States v. Ware,** 247 F.2d 698, 700 (7th Cir. 1957). This Court has never interpreted Rule 613(b). The conflict occasioned by that rule in the circuit courts of appeals requires a definitive determination of this troublesome procedural point.

The prohibition in **Ware** against a written synopsis of the prosecution's case has been followed in other circuits. **United States v. Frattini,** 501 F.2d 1234 (2d Cir. 1974), **Sanchez v. United States,** 293 F.2d 260 (8th Cir. 1961). But see, **United States v. Jones,** 491 F.2d 526 (8th Cir. 1973), cert. denied 417 U.S. 970 (1974), **United States v. Parker,** 491 F.2d 517 (8th Cir. 1973). Indeed, the Fifth Circuit relied on **Ware** in **United States v. Brown,** 451 F.2d 1231, 1234 (5th Cir. 1971). The implicit overruling of **Brown** by the Court below and the Court's reliance on Rule 613(b) in doing so indicates a misconception of that rule. It also demonstrates the conflict created between the case at bar and **Frattini, Sanchez** and **Ware, supra.**

Petitioner has no argument with the admissibility of a written prior inconsistent statement. **Gordon v. United States,** 344 U.S. 414 (1953). In **United States v. Smith,** 521 F.2d 957 (D.C. Cir. 1975), the Court of Appeals held that the defendant was entitled to have a police report admitted into evidence as a business record pursuant to 28 U.S.C. §1732(a), regardless of how the Federal Rules of Evidence are construed. **Smith** at

969. Petitioner's argument, however, centers on the admissibility of a written statement when it sets forth a "neat condensation" of the government's case, thus providing the jurors with a persuasive writing for reference during their deliberations. Kilgore, in short, accompanied the jury and gave testimony during its deliberation.

The fact that the government did not introduce the statement or move for its admission is immaterial. The reason for excluding such comprehensive writings is the avoidance of prejudice to the defendant. Whether the government or a co-defendant prejudices Petitioner by seeking admission of the "neat condensation" is a distinction without a difference. Besides, the government became an interested party to the evidentiary conflict between the defendants when it withdrew its initial objection to the admissibility of the writing and paved the way for its admission.

Even if the government had no part in admitting the writing, its admission set up an irreconcilable conflict between Massler and his co-defendants. **Schaffer v. United States,** 362 U.S. 511, 516 (1960), emphasized that a trial court should grant a severance during any stage of a trial if a showing of prejudicial misjoinder appears within the meaning of F.R.Crim.P. 14.

The trial court expressed the opinion that, even if the writing were inadmissible as a prior inconsistent statement, it could be admitted as a prior consistent statement on the government's motion. (App. C, pp. 62-63) That reasoning does not provide a justifiable alternative for admitting the writing. Kilgore could not remember when he wrote the statement. (App. C, P. 57) Nor could he explain why it was dated two months before the conspiracy allegedly began. (App. C, p. 57) His recollection for writing the statement was limited to his motive -- he wrote it at the request of law enforcement officials. (App. C, p. 57)

As a result of Kilgore's testimony, the writing would not be admissible as a prior consistent statement in accordance with F.R.Evid. 801(d) (1) (B), contrary to

the opinion of the trial judge. (App. C, pp. 62-63) That is, Kilgore was acting in conjunction with law enforcement officials. Absent a change in motive or circumstances, prior consistent statements are no more than repetitious. They do not support an inference of veracity. 4 Weinstein & Berger, **Weinstein's Evidence,** 801-100 (1975) [citing] **Coltrane v. United States,** 418 F.2d 1131, 1140 (D.C. Cir. 1969).

Therefore, since the Court of Appeals below relied on Rule 613(b) and thereby created a conflict in the courts of appeal over the question of whether that rule permits the admission of a "neat condensation of the government's whole case," this Court should issue the Writ of Certiorari to provide a controlling interpretation of the rule and resolve the conflict.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the Court of Appeals for the Fifth Circuit.

UNITED STATES v. RICE
550 F.2d 1364 (1977)

Forrest E. Campbell, Greensboro, N.C., for Rice and Wells.

Herman I. Graber, Lynne Stewart, New York City, N.Y., Allen L. Jacobi, Coconut Grove, Fla. for Massler.

Bernard H. Dempsey, Jr., Robert A. Fraser, Tampa, Fla., for Alvarez.

John L. Briggs, U.S. Atty., Jacksonville, Fla., L. Eades Hogue, Special Atty., Tampa, Fla., Milton J. Carp, Dept. of Justice, for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before JONES, COLEMAN and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

Along with others, Alvarez, Wells, Rice and Massler were charged in a one count indictment with conspiracy to import, possess and distribute marijuana, 21 U.S.C. §§ 841 (a)(1), 952(a). A twelve day trial resulted in a guilty verdict. Alvarez received a three year sentence, Wells one year, while Rice and Massler were sentenced to two and one-half years.

We affirm.

I. THE FACTS

The government's case depended, in the main, on the testimony of William Kilgore, an unindicted co-conspirator, in protective custody, who appeared under a grant of "informal" immunity.

Kilgore's Testimony

Kilgore first met Alvarez in 1968 or 1969. In February,

1972, Alvarez hired Kilgore to guard a cache of marijuana located at "Stash House No. 1" in Odessa, Florida. For three weeks Kilgore was paid to guard the contraband, to weigh it for customers, and collect for it. Alvarez told Kilgore that the marijuana, stored in bales and burlap sacks, came from Colombia, South America.

Later on in February Alvarez took Kilgore to Mike Sarga's "Stash House No. 2", in the same vicinity, where he did similar work.

In March, Kilgore and Alvarez flew to New York. After arrival Kilgore went with Allen Jacobs to Woodstock to guard a stash house located there. Sarga and Massler soon drove up in a van with a boat on top. The boat contained 350 pounds of marijuana. The next day Alvarez directed Kilgore to let Jacobs and Massler have 100 pounds each, on consignment. Later, Alvarez directed Sarga and Kilgore to transfer the remainder of the marijuana to Massler in Manhattan. Kilgore stayed in New York about a week and collected $120,000 from Jacobs and Massler, owed Alvarez for the pot. Kilgore then returned to Tampa and turned the money over to Alvarez.

Around the first of April, Alvarez contacted Kilgore again and asked him if he would like to go to Colombia and guard a return load of marijuana. Kilgore was also to pay the Colombian connection, Pedro and Alberto Davilla. He was to fly down on a DC-3, piloted by Wells and Rice and was to be paid $5000 for his part in the trip. Alvarez drove Kilgore to the Hawaiian Village Motel where Kilgore met Rice and Wells. Rice there stated that Alvarez had paid $10,000 to rent the plane for a prior trip and had then bought the plane for $10,000. Rice and Wells related to Kilgore an account of a prior similar trip to Colombia on which Alvarez had accompanied them. Alvarez had also told Kilgore of the prior trip, saying that the marijuana at "Stash House No. 1" had been obtained at that time.

The next day Kilgore, Rice and Wells flew to a location south of Bogata, Colombia. Once there, the defend-

ants gave the Colombians the money and certain other items and loaded 3500 pounds of marijuana on the plane.

On return to the United States, they landed first at Lakeland, then returned to Zephyrhills. Once they landed, Alvarez and two others arrived in a Winnebago, into which they loaded the marijuana. From there, the party went to a house in Riverview and distributed part of the marijuana.

Subsequently, Alvarez again contacted Kilgore and asked him if he'd like to make a second trip to Colombia. A couple of weeks later, Alvarez approached Kilgore about making another trip to New York to collect money from Massler. Kilgore made this trip around the end of April, 1972, but returned to Tampa without the money. Massler followed a few days later and paid Alvarez in excess of $100,000.

Kilgore's testimony was supported by other items of evidence adduced by the government. Much of the conspiratorial activities had been recorded on film. One of the defendants had taken several hundred photos of the operation. Negatives of these photographs were volunteered to the law enforcement officers by the manager of the photography department at J. C. Penney's, who discovered the contents by chance.

The manager of the Hawaiian Village Motel corroborated Kilgore's account of the stay at that motel, although his testimony did differ in some aspects.

Lastly, one Porter reluctantly testified that Rice discussed with him the possibility of using one of Porter's airplanes for importing marijuana, that Rice leased a Douglas DC-3, and Wells had signed the agreement as a witness. He stated that sometime in April, 1972, he sold the craft to Rice and Wells. Porter once saw Rice and several other individuals unloading several dark, big, square parcels from the plane. He also saw a late night operation in April or May of 1972, in which a DC-3 landed, a vehicle approached the plane, there was activity around the plane, and the vehicle left. Additionally, Porter testified that Rice and Wells made inquiries

of him as to how to arrange additional fuel sources for the DC-3.

This array of evidence, accepted by the jury as being true beyond a reasonable doubt, reduces the appellants to a many sided attack on various aspects of the trial.

II. APPELLATE CONTENTIONS

A. *Massler, Alvarez, Wells and Rice*

1. *Pre-Indictment Delay*

There was a three and one-half year delay between the close of the alleged criminal activities and the return of the indictment. It is argued that this unconstitutionally prejudiced the defense and that by not holding an evidentiary hearing to determine the cause for the delay the District Court reversibly erred.

The defendants complained generally that due to the delay, possible witnesses were either "unremembered or unavailable," that the delay severely prejudiced the defense, and that it was intended to give the government a tactical advantage over the defendants, that is, to enable the government to procure evidence of subsequent criminal acts of *some* co-defendants to bolster the prosecution of *all*.

No such later acquired evidence was ever offered against any of the defendants. No list of unavailable witnesses was tendered, nor was there any recitation of any exculpatory testimony thus put beyond the reach of the defense.

[1, 2] The Supreme Court has held that the applicable statute of limitations is the primary, but not the sole, guarantee against the bringing of overly stale criminal charges; that one seeking to establish impermissible indictment delay under the Due Process Clause must show substantial actual prejudice resulting from the delay or that the delay was an intentional measure designed to gain a tactical advantage for the prosecution. Absent such a showing no Constitutional violation has

been inflicted and the indictment need not be dismissed. See *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). The Sixth Amendment right to speedy trial arises only when a defendant becomes an accused, either through arrest, indictment, or information. See *United States v. Marion, supra; United States v. Harrington*, 5 Cir. 1976, 543 F.2d 1151; *United States v. Davis*, 5 Cir. 1973, 487 F.2d 112, 116 *cert. den.*, 1974, 415 U.S.: 981, 94 S.Ct. 1573, 39 L.Ed2d 878; *United States v. Broadway*, 5 Cir. 1973, 477 F.2d 991, 996.

[3] *Speculative assertions*, such as allegations of lost witnesses, ensuing indigency, failure of memory, and general inability to defend oneself due to the delay, fall short of the *Marion* standard, *United States v. Butts*, 5 Cir. 1975, 524 F.2d 975, 977; *United States v. McGough*, 5 Cir. 1975, 510 F.2d 598, 604; *United States v. Broadway*, 5 Cir. 1973, 477 F.2d 991.

[4] An evaluation of this appellate record in the light of the foregoing considerations shrinks the complaint about pre-indictment delay to nothing more than a complaint. There was no showing of actual prejudice. The contention fell so far short of *Marion* standards and our own decisions on the subject that it was without substance. The denial of an evidentiary hearing on the matter was not erroneous.

2. *Severance*

Various motions for severance were grounded on an expressed desire to call one co-defendant or another as a witness on behalf of the respective movants.

[5, 6] In our previous decisions we have clearly delineated what must be shown to warrant granting a motion to sever under the circumstances present here. The movant must demonstrate:

(1) bona fide need for the testimony;
(2) the substance of the desired testimony;
(3) its exculpatory nature and effect; and

(4) that the designated co-defendant will *in fact* testify at a separate trial.

United States v. Morrow, 5 Cir. 1976, 537 F.2d 120, 135; *United States v. Diez,* 5 Cir. 1975, 515 F.2d 892, 903, *cert. den.* 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *United States v. Burke,* 5 Cir. 1974, 495 F.2d 1226, 1234; *United States v. Martinez,* 5 Cir. 1973, 486 F.2d 15, 22; *Byrd v. Wainwright,* 5 Cir. 1970, 428 F.2d 1017, 1019—1022.

The trial court should

(1) examine the significance of the alleged exculpatory testimony in relation to the defendants' theory of defense;
(2) assess the extent to which the defendant might be prejudiced by the absence of the testimony;
(3) pay close attention to judicial administration and economy; and
(4) give weight to the timeliness of the motion.

Id.

[7] Massler moved pretrial for a severance predicated on Rule 14, Fed.R.Crim.P.[1]

1. Rule 14 provides:

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

He asserted that while co-defendant Alvarez would not testify in his behalf at a joint trial he would do so if there was a severance. The motion stated:

In the instant case, Pedro Alvarez has stated, and he will so depose if requested, that if called at a sep-

arate trial where he will not need to exercise a Fifth Amendment privilege, he will and can give evidence that will exonerate Jerrold Massler completely. If tried jointly, Mr. Alvarez will, of course, not testify.

This motion did not state what Alvarez would, in fact, testify to. Whatever the testimony, it was contingent upon Alvarez not being required to testify to anything which might tend to incriminate him.

The denial of the motion in this form was not error.

When trial day came Massler renewed his motion. Other defendants decided that they would attempt to board the same train. Alvarez indicated that he wanted to call Massler as a witness. Wells said that he desired to call one or more of the co-defendants as his witnesses.

[8] Alvarez told the Court that he planned to call Massler as his first witness. He stated that he would prove by Massler that Massler was in jail in the latter part of April, 1972, contradicting the testimony of Kilgore that he met Massler in Tampa in late April. If Massler was in jail in late April there should have been records to prove it without the necessity of calling Massler to the stand. Massler's attorney stated that his client would be willing to testify if "he could no longer be prosecuted for the events contained within this indictment", which amounted to nothing more than a suggestion that Massler would testify on his own terms, a grant of immunity from prosecution. The denial of Alvarez's motion was entirely in order.

Later in the trial, Massler's attorney told the Court that he wanted to call Alvarez as a witness. He stated that Alvarez would testify that he never received $200,000 from Massler as Kilgore testified, "and that he would exculpate my client in terms of this particular conspiracy". It was stated that Alvarez would not testify as a defendant but he would testify in a separate proceeding where his guilt or innocence was not on the line.

[9] During the same conference, Rice's attorney stated that he wanted to call Massler as a witness. He stated

that Massler would testify that "he was not acquainted with my client during the period of time alleged in the conspiracy". Here it is to be noted that the government never claimed that Massler had any contact with Rice. Rice dealt with Alvarez.

[10] Wells' attorney informed the Court that he desired to call Alvarez to testify as to the factual setting for two photographs depicting Wells and Alvarez in an airplane. This testimony would have been that the picture depicted a legitimate charter flight on which Alvarez hired Wells to fly him to the Bahamas. Wells' attorney stated that "that would be all I would ask Mr. Alvarez concerning his relationship with Mr. Wells. I think it is highly probative." It was stated that Alvarez would testify in a proceeding where his guilt or innocence was not being determined.

Some of the motions were not made until the eleventh day of a twelve day trial.

For lack of any reasonable certainty that the proposed witnesses would, in fact, testify; for lack of relevance; for lack of the requisite exculpatory showing; and for lack of timeliness, we hold that the defendants were not prejudiced by the denial of the severally requested severances. The denials did not amount to reversible error.

3. *Cross Examination*

The appellants complain of being prohibited "from cross-examining Kilgore about his protected custody over a five month period and his activities during that time". The Court ruled:

> [N]o one shall seek to elicit from the witness that he is in protective custody as a result of any specific fear of harm at the hands of the defendant Alvarez.
>
> [T]he Court will direct counsel not to make inquiry as to the precise nature of the witness' present employment.

The Court, specifically informed counsel, however,

that they could inquire as to the fact that Kilgore was in protective custody, whether he was receiving payments from the government, whether he was gainfully employed, and what income he had. Counsel for Massler replied that he had no desire to find out where Kilgore was working or living.

[11] Although generally there is a right to inquire into a witness's background and environment in order to place the witness in his proper setting, *Alford v. United States,* 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1931), there are limitations. As *Alford* recognizes.

> There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.

Id. 282 U.S. at 694, 51 S.Ct. at 220.

In *Smith v. Illinois,* 390 U.S. 129, 133—134, 88 S.Ct. 748, 751, 19 L.Ed.2d 956 (1968), Mr. Justice White, concurring, stated that in addition to those exceptions noted in *Alford,* he "would place in the same category those inquiries which tend to endanger the personal safety of the witness". We have followed this exception. See *Knited States v. Alston,* 5 Cir. 1972, 460 F.2d 48, and *United States v. McKinley,* 5 Cir. 1974, 493 F.2d 547.

While maintaining a due regard for the constitutional right of confrontation, "the scope and extent of cross-examination is generally declared to be within the sound discretion of the trial court" and will not be interfered with absent an abuse of that discretion. *United States v. Brown,* 5 Cir. 1977, 546, F.2d 166, 169; *Grant v. United States,* 5 Cir. 1966, 368 F.2d 658, 661. Of course, when it is the "star" witness who is being cross-examined, or when he was "an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified". *United States v. Brown, supra,* 546 F.2d at 170; *Beaudine v. United States,* 5 Cir. 1966, 368 F.2d, 417, 424.

[12] At an *in camera* conference the government informed the Court that any inquiry into the nature of Kilgore's work would readily reveal where he was working and would endanger him. We have no transcript of what occurred at the hearing but we have no difficulty in perceiving, viewing the record as a whole, that there was a reasonable necessity for not revealing where Kilgore lived and worked when the case came to trial. That he was in protective custody was revealed.

The defendants also complain of being prohibited from asking Kilgore the circumstances surrounding his discharge from the military, certain aspects concerning an arrest for possession of heroin in 1973, and questions concerning trips by him to New York and to Miami.

We have looked carefully at the numerous evidentiary exceptions raised by appellants but the totality of the matter is that Kilgore was subjected for several days to rigorous cross examination, which developed many facts which might have discredited his testimony on direct. We conclude that there was no transgression of Sixth Amendment rights. See, in particular, *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

4. *Rule 404(b)*

Kilgore testified that he knew Alvarez and pointed him out in court. He said he first met Alvarez in 1968 or 1969.

The government admitted that it knew what the answer was going to be when it thereafter asked Kilgore the following question:

> "Sir, what association, if any, did you have with Mr. Alvarez once you all met?"

There was an objection that any relationship prior to the inception of the conspiracy on January 1, 1972, was irrelevant and immaterial. Defense counsel pointed out that Kilgore "says he knows him". The objection was overruled on the ground that the jury would be instructed as to the time period charged in the indictment and that the relationship prior to that time "could be relevant

with respect to the state of mind, or behaviour of the subject in explaining whatever he says explains subsequently of himself of the defendant".

Kilgore then responded, "We used to trade guns for dope and —".

The defense then moved for a mistrial.

There was a protracted conference in the absence of the jury. The government said that the proof was offered to show that this prior association was what prompted Alvarez to trust Kilgore with guarding the marijuana and collecting for it.

The prosecution further proffered that when Kilgore said "dope", he was referring to marijuana. The Judge asked Kilgore what he meant and Kilgore replied "marijuana and hashish". After this lengthy discussion, the Court determined that the statement was admissible under 404(b) of the Federal Rules of Evidence.

Once the jury returned, Kilgore testified what he meant by the word "dope". The Judge instructed the jury that Kilgore's statement should be considered *only with respect to Alvarez* and the statement should "receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence" adduced at trial.

Rule 404(b) provides:

Other crimes, wrongs, or acts.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[13] We have recently analyzed this rule in *United States v. Bloom*, 5 Cir. 1976, 538 F.2d 704. Noting that it coincides with existing case law in this Circuit, *Id.* at 708, we stated that, "evidence of acts extrinsic to the crime charged is admissible under the itemized excep-

tions once the trial court is satisfied that certain threshold prerequisites have been met". *Id.* at 708. These prerequisites are:

(1) Proof of the prior *similar* offenses must be "plain, clear and convincing";
(2) The offenses must not be too remote in time to the alleged crime;
(3) The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;
(4) There must be a substantial need for the probative value of the evidence provided for by the prior crimes.

Id. at 708 (emphasis in original).

[14] Without commenting on the first three criteria, we feel it is clear that the disputed statement fails to pass criterion number four. There was *no* need for the evidence in the form rendered. Kilgore had stated that he had known Alvarez since 1968 or 1969 and had pointed him out in court. Any need for evidence to establish the manner in which Kilgore and Alvarez met could have been accomplished without mentioning "trading guns". The government's deliberate interjection of this testimony exhibits lack of the appropriate sensitivity to the defendants' substantive rights. We expressly disapprove it.

[15] Nevertheless, we are convinced that the error was harmless beyond a reasonable doubt. The evidence of defendants' guilt was abundant; the trial lasted twelve days; fourteen witnesses were heard. We are persuaded, therefore, that this one statement in such a massive trial could not have possibly influenced the jury to reach an improper verdict.

In *United States v. Resnick,* 5 Cir. 1974, 488 F.2d 1165, *cert. den.,* 416 U.S. 991, 94 S.Ct. 2400, 40 L.Ed.2d 769, the defendant was charged with selling firearms to non-residents and failing to keep appropriate firearms transaction records. An A.T.F. agent testified to certain

unrelated criminal activity, namely that the defendant dealt in stolen guns and participated in the unlawful alteration of semi-automatic weapons to fully automatic ones. Defense counsel moved for a mistrial, which was denied. The trial court stated that it would instruct the jury to disregard the tainted testimony. The District Court, however, did not give the promised curative instruction conference, defendant's attorney stated that he had no objections to the charges given.

In holding that the error was harmless, we said:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. . ."

Kotteakos v. United States, 1946, 328 U.S. 750, 764, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557; F.R. Crim.P. 52(a). In the circumstances of this case, we are convinced that the substantial rights of Resnick were not affected.

> "[W]e have carefully canvassed the entire record and transcript, and are convinced that no prejudice resulted in any wise affecting the verdict of the jury. The evidence of defendant's guilt is strong, clear and convincing beyond question."
>
> *Id.* at 1168.

See *also United States v. Beasley,* 5 Cir. 1977, 545 F.2d 403; *United States v. Bloom, supra; United States v. Barnett,* 5 Cir. 1974, 492 F.2d 790; *United States v. Harbolt,* 5 Cir. 1974, 491 F.2d 78; *United States v. Roland,* 5 Cir. 1971, 449 F.2d 1281.

As in *Resnick, supra,* the District Court herein specifically asked counsel for Alvarez if he desired an instruction relating to the disputed statement, stating that it would be willing to give a limiting instruction if one was requested. Counsel for Alvarez declined the offer.

In view of the instructions as to the other defendants given at the time the statement was admitted, it was not error to deny a mistrial as to them. *United States v.*

Davis, 5 Cir. 1977, 546 F.2d 617, 620.

III. ALVAREZ, WELLS, AND RICE

1. *Massler's Exhibit No. One*

While Kilgore was being cross-examined, the government turned over to the defendants a hand-written statement, prepared by Kilgore at an undetermined date, which was a summary of the events to which he had testified. The statement related various aspects of the conspiratorial operations. Massler's name did not appear in the account but the names of the other defendants were included.

Alvarez had the exhibit marked for identification and cross-examined Kilgore about it, as did Massler's attorney. Several days later, Massler informed the Court that he intended to offer Kilgore's written statement into evidence as exculpating Massler by failure to mention his name. The Court reserved its ruling. After several discussions about the admissibility of the exhibit, the government withdrew its objections and the statement was admitted, albeit over the objections of the remaining defendants.

Three questions were raised by these defendants with regard to the admission of this evidence:

(A) Whether, in fact, it was admissible;
(B) Whether the Court erred in not giving instructions to the jury as to its use, limitations, and significance; and
(C) Whether the Court erred in denying Alvarez's, Wells', and Rice's motions for severance after the document was admitted.

In admitting "Massler's Exhibit No. One", the Court stated that it was allowing it in under 613(b) Fed.R.Evid. because of its inconsistency with portions of Kilgore's testimony, because Kilgore had been cross-examined at length concerning the exhibit, and because the govern-

ment objections to its introductions had been withdrawn.

Rule 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice, otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[16,17] This rule establishes three criteria which must be met before the statement is admissible:

(1) It must be a prior inconsistent statement of the witness;
(2) The witness must be afforded an opportunity to explain or deny the statement; and
(3) The opposing party must be afforded an opportunity to interrogate the witness concerning the statement.

All three elements are present here.

[18] Defendants complain that no limiting instruction was given and, that under our previous decisions, this was error. *See United States v. Sisto,* 5 Cir. 1976, 534 F.2d 616; *United States v. Garcia,* 5 Cir. 1976, 530 F.2d 650; *Slade v. United States,* 5 Cir. 1959, 267 F.2d 834.

The fact is that a limiting instruction *was* given. The Court told the jury:

> The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. *The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements.* (Emphasis added.)

The Court then instructed the jury on the effect of impeachment through such statements.

[19] Denying the severance requested by the other defendants was not error. *United States v. Maddox,* 5 Cir. 1974, 492 F.2d 104, 108, *cert. den.* 419 U.S. 851, 95 S.Ct. 92, 42 L.Ed.2d 82 (1974); *United States v. Johnson,* 5 Cir. 1973, 478 F.2d 1129, 1131, n. 3; *United States v. Harris,* 5 Cir. 1972, 458 F.2d 670, 673, *cert. den.* 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972); *United States v. Levrie,* 5 Cir. 1971, 445 F.2d 429, 431; *James v. United States,* 5 Cir. 1969, 416 F.2d 467, 475.

2. *Witness Interview*

[20] The defendants urge that the District Court erred by refusing to compel Kilgore to submit to an interview by defense counsel. As the result of a motion by the defendants, the government made Kilgore available to the defendants for an interview. Kilgore, however, refused to answer any questions about the case. Both before and during trial, the District Court interviewed Kilgore concerning his refusal to talk with defense counsel. There is no indication that the government was responsible for Kilgore's attitude. To the contrary, Kilgore told the Court that the government had told him that he could talk to defense counsel and that the matter was strictly up to him. All that a defendant is entitled to is *access* to a prospective witness. This right, however, exists co-equally with the witnesses' right to refuse to say anything. *United States v. Dryden,* 5 Cir. 1970, 423 F.2d 1175, 1177, *cert. den.* 398 U.S. 950, 90 S.Ct. 1869, 26 L.Ed. 2d 290 (1970). "A government witness who does not wish to speak to or be interviewed by the defense prior to trial may not be required to do so." *United States v. Benson,* 5 Cir. 1974, 495 F.2d 475, 479.

IV. MASSLER

Inquiry by Jury

After one hour of deliberation, the jury sent the Court a written message requesting "all transcripts now available in written form." The Court discussed how it

planned to handle the request and there was no objection. The jurors were called back and the Court advised them:

> Now if you do have, or if you should have during your deliberation some particular or narrow question, so-to-speak with respect to an item, or items of testimony you, of course, may request it in a written message . . . and I will give consideration to that . . . But, in all events, a broad request such as you have made here for all available transcripts cannot be granted by me under prevailing policy and rules, and I trust you will understand that.

No objections were made at this time either.

[21] The discretion of the trial judge in ruling on jury requests of this nature is broad, *see e. g., Government of the Canal Zone v. Scott,* 5 Cir. 1974, 502 F.2d 566; *United States v. Braxton,* 5 Cir. 1969, 417 F.2d 878; *Pinckney v. United States,* 5 Cir. 1965, 352 F.2d 69.

In *United States v. Morrow,* 5 Cir. 1976, 537 F.2d 120, 148, we held that the trial court did not abuse its discretion in denying the jury's request for over 300 pages of transcript. We stated: "The possibility of undue emphasis by the jury on a small part of the testimony given in the six week trial of this case amply justified the district court's denial of the jury request." *Id.* at 148.

[22] The jury's request herein could conceivably have meant the transmittal to them of over 2000 pages of transcript. There was no abuse in denying that request.

V. OTHER ASSERTED ERRORS

In addition to the points hereinabove discussed, the appellants claim errors as to alleged *Bruton* rights, that they were prosecuted for a multiple conspiracy, that they were improperly denied an opportunity to take the deposition of two Colombian nationals in Colombia, that they were erroneously denied an opportunity to attack

the reliability of certain photographic evidence, that the evidence was insufficient to support Rice's conviction, that the trial judge displayed improper irritation with the witness Porter, and that the jury was not fully instructed as to the testimony of accomplices. They also complain of the differences in the sentences imposed on the several defendants.

A searching evaluation of these contentions reveals their lack of merit. We see no benefit to be had by unnecessarily prolonging this opinion with an extended discussion of these matters.

CONCLUSION

The record in this appeal reveals that the appellants were bereft of a defense on the facts. Accordingly, defense counsel retreated to the only hope left — an able, ingenious, persistent attack on trial procedures. They are to be complimented for their efforts, but the convictions must stand unreversed.

AFFIRMED.

BY MR. HOGUE:

Q Mr. Kilgore, how old are you, please?

A I am twenty-eight years old.

Q Where were you born?

A In Warren, Ohio.

Q Have you ever been a resident of Tampa, Florida?

A Just about all my life, yes, sir.

Q Were you a resident of Tampa, Florida, during the period of time, say, 1968 through 1975?

A Yes, sir, I was.

Q Alright, sir. I'll ask you now, do you know the Defendant in this case, Pedro Alvarez?

A Yes, sir, I do.

Q Do you see him in the Courtroom?

A Yes, sir, I do.

Q Would you point him out, please, and describe what he is wearing?

A He is wearing a brown suit, uh, blue shirt, medium hair. He is sitting next to the gentleman with the long hair and next to the blonde gentleman.

Q Thank you, sir.

If the Court please, may the record reflect that he's identified the Defendant, Pedro Alvarez?

THE COURT: It will so reflect.

BY MR. HOGUE:

Q Mr. Kilgore, do you recall the first time you met Pedro Alvarez?

A Yes, sir. I do.

Q Would you relate to the Jury what were the circumstances of that meeting?

A Yes, sir. It was in '68.

MR. LEVINE: Excuse me a second. I would like to ask if we could get a time first, see whether or not it is within the framework of the indictment.

THE COURT: I thought that was part of the question.

MR. LEVINE: He asked the circumstances - -

THE COURT: When was it, Mr. Kilgore?

THE WITNESS: It was in '68 or '69.

BY MR. HOGUE:

Q Alright, sir. Where did that meeting take place?

MR. LEVINE: Your Honor, please, I object, it is irrelevant and immaterial. It is beyond the scope of the indictment. Charged with an incident that occurred January, '72 to June of '72.

THE COURT: Well, at this point, I cannot tell. I'll reserve ruling on it. I'll take the answer, however, it could be irrelevant as to the first question that he had to meet with Mr. Alvarez.

Go ahead.

BY MR. HOGUE:

Q Go ahead, sir. Where did the initial meeting with Mr. Alvarez take place?

A At the Outlaw Pawn Shop on Dale Mabry.

Q Who introduced to you this gentleman, the Defendant, Mr. Alvarez?

A A guy by the name of Mike Hearst.

Q Did there come a time after this initial meeting with Mr. Alvarez that you became friends with him?

A Yes, sir, we did become friends.

Q Alright. Sir, what association, if any, did you have with Mr. Alvarez once you all met?

MR. LEVINE: To which I object, it is irrelevant and immaterial what the relationship may have been prior to January 1, 1972.

He has identified him, he says he knows him, and any information that interim period is is irrelevant and immaterial to this issue.

THE COURT: I'll overrule the objection.

I will, of course, instruct the Jury that the allegation of the indictment is that the conspiracy charged existed

from on or about January, 1972 until June of the same year, which is the issue in the case. However, the relationship, if any, which the witness might testify to between hmself and any Defendant on trial could be relevant with respect to the state of mind, or behaviour of the subject in explaining whatever he says explains the subsequently of himself or the Defendant.

BY MR. HOGUE:

Q Alright, sir. Would you please tell the Jury in what manner you became associated with Mr. Alvarez?

A We used to trade guns for dope and –

MR. LEVINE: Your Honor please –

THE COURT: We would go –

MR. LEVINE: Your Honor please, I move for a mistrial.

MR. GRABER: Your Honor, I join in that motion.

THE COURT: Alright.

MR. LEVINE: May we be heard?

THE COURT: Come to side bar.

(Thereupon, the following side bar discussion was had between Court and counsel.)

MR. LEVINE: Your Honor please, the Defendant, Alvarez specifically moves for a mistrial as it relates to the evidence that has now been presented before the Jury. The prosecutor well knew from the testimony given in the Geders case, which we all have, that this testimony was going to come in. He was not unaware of it. Specifically, asked questions that went to it and directed its impact and import thereto. It is not relevant or germane to the controversy for which we are charged. It is too far away in point of time. It is only prejudicial. It brings my client's character into issue, and we haven't put his character into issue as yet. It attempts to establish a a crime that my client committed that may be a State and Federal offense for which he has never been charged. It

is – it has no probative value whatsoever particularly in light of the point in time.

THE COURT: Did you anticipate that response from the witness, Mr. Hogue?

MR. HOGUE: Sir?

THE COURT: Did you anticipate that response from the witness?

MR. HOGUE: The response about the marijuana? Yes, sir, I did.

THE COURT: Well, he said, "Dope."

MR. HOGUE: Yes, sir.

No, I don't deny – the Government does not deny he knew that is what he was going to say.

MR. LEVINE: Judge –

THE COURT: Well –

MR. ROSE: We submit it is material to show his relationship with Mr. Alvarez at a later time, his continued association in drug trafficking with Mr. Alvarez, whether it is relative to the beginning of this particular conspiracy we are not necessarily concerned with and wouldn't object to limiting, but shows relationship with Mr. Alvarez from when he met him, how he became associated with, shows his relationship during the conspiracy.

MR. GRABER: Your Honor, I submit this shows -- the only purpose is to show propensity to commit a crime, and I submit to Your Honor that the Supreme Court, if Mr. Alvarez took the stand would have said, "If that is the purpose, you can't even ask him about that." What they are doing is the reverse, taking the witness to show that which they couldn't ask Mr. Alvarez from the stand. I submit further, Your Honor, Mr. Massler has been prejudiced by this just on the spill over effect. Here we have testimony now -- you have a situation of a prior crime in which my client is charged along with Mr. Alvarez, and

I submit to Your Honor that there is no way at this point that Mr. Massler can obtain a fair hearing.

MR. CAMPBELL: I submit the same thing for Mr. Rice.

MR. LEVINSON: Judge, if I could comment on behalf of Mr. Wells, I would join in Mr. Levine's motion and additionally ask for severance of Mr. Wells from the trial of Mr. Alvarez based on the fact that the evidence now before the Jury is that Mr. Alvarez so prejudices my client, has no probative value as relates to my client to - - prohibitive from having a fair and equal trial in this - -

MR. LEVINE: Judge, could we deal with this maybe out of the presence of the Jury? I submit it is really a meaningful and significant issue particularly with Government's admission that they knew it was coming. It is interesting that they didn't present this kind of issue for a prior determination by the Court, but they ran full steam right ahead into it intending - - intending the result. As a matter-of-fact, it is really unfair even to grant a mistrial although I've asked for it because of the fact that my client has now been put to the problem of paying for the attorney being here a day, all preparatory work in connection therewith, uh, I wonder if they have some authority knowing they were going to do this? I read the transcript. I couldn't conceive that they would. If they had some authority they - - that would support their contention here - -

MR. CAMPBELL: My client has not even been identified in this case, Your Honor, but yet he is charged now with the spill over of some crime that took place years before.

MR. HOGUE: Your Honor, the Government would respond to all these remarks by fellow counsel that Mr. Kilgore is charged as a - - the testimony will show, we

proffer that Mr. Kilgore was a co-conspirator with these other Defendants, specifically that he worked for the Defendant Alvarez and that they worked together for the purpose of importing marijuana and distributing marijuana within this country, that they became associated together prior to January of 1972 and that their association included the fact that marijuana, uh, that they had marijuana dealings together - -

THE COURT: Well, just a minute. The word used by the witness in his answer which provoked these motions was, "dope". Now are you in a position to maker a proffer as to what he means by the word, "dope"?

MR. HOGUE: I believe I am, yes, sir. The Government proffers that he means marijuana, and I can say in good faith I think that is all he means is marijuana.

THE COURT: To the exclusion of any other controlled substance?

MR. HOGUE: Yes, sir. I can make that proffer in good faith, Your Honor. We would have no objection to the Jury being removed and further inquiry by us being made into what he means by, "dope".

THE COURT: Alright. Let me have the Jury withdrawn.

(Side bar discussion concluded.)

THE COURT: Ladies and gentlemen of the Jury, the matter before the Court requires further discussion with counsel, and for your convenience and for ours, I am going to ask you at this time if you would please withdraw to the Jury room, and I will send for you as soon as we are ready to proceed in your presence in this case. I do ask now that you retire to the Jury room, please.

(Thereupon, the Jury was taken from the Courtroom.)

THE COURT: Mr. Hogue, continue that examination of the witness to clarify the question last discussed at side bar.

BY MR. HOGUE:

Q Mr. Kilgore, you mentioned that you traded guns to Mr. Alvarez for dope. Would you explain to his Honor what you mean when you say, "dope."

A I mean marijuana.

Q Alright, sir. Now, are you referring to any other drugs of any kind?

A Hashhish. We traded for pot and hashhish.

Q Now, hashhish, what is that?

A It is like a condensed version of pot.

Q Now, pot, uh, for the record is marijuana?

A Yes, sir.

MR. HOGUE: Your Honor, should I inquire further on that point?

THE COURT: No. That is unnecessary.

MR. LEVINE: Judge, could we be advised as to the theory upon which they seek to offer this? Is this supposed to be a prior similar transaction? I mean, what is – so that I know how to address myself in terms of factual argument, is that the Government's theory?

THE COURT: Alright. What is your response to that question, Mr. Hogue?

MR. ROSE: Your Honor, if I might respond to that. Our response is simply this: That on January 1, that Mr. Kilgore just didn't appear out of thin air and start to work for Mr. Alvarez, he did something for him prior to January 1, 1972, and this witness' testimony is just a lead in to show his association with Mr. Alvarez in the past.

MR. LEVINE: Judge, could we have the witness removed while we argue the legal issue, if we might?

THE COURT: Alright.

Mr. Kilgore, step down and retire from the Courtroom momentarily, please, while I consider this matter with counsel.

(Thereupon, the witness was removed from the Court-

room.)

THE COURT: Pardon me for a minute, Mr. Levine.

I have not specifically been requested by any counsel to invoke the Rule though that was more-or-less implicit in some of our prior discussions. Are there any witnesses present? Anybody desire to invoke the rule in this case?

MR. ROSE: Government would invoke the rule, Your Honor, with the exception of Mr. Jahnke.

THE COURT: Alright.

MR. CAMPBELL: Yes, we would, Your Honor.

THE COURT: The rule has been invoked.

It will be necessary, of course, for all persons having any reason to believe they may be called as witnesses in this case by any party to withdraw and remain outside the Courtroom at all times during these proceedings unless and until they are called in as a witness. And witnesses while waiting to testify are admonished not to discuss the case in any manner among themselves. The rule of sequestration, of course, will exclude the parties to the case and Mr. Jahnke, whom I previously ruled would be permitted at counsel table for the Government.

I will, of course, rely upon counsel to see that the rule is observed.

Now, go ahead, Mr. Levine.

MR. LEVINE: Judge, it doesn't even appear that the Government's theory is, of prior similar transaction. I've asked for Your Honor to have them articulated, and they have declined to do that.

One of the reasons why I asked the witness to step out was from the testimony he gave in the Geders and Fink case, his testimony is substantially the same. I'd submit to Your Honor they have no proof of importation of this dope, no proof of importation of it and, therefore, it would not be a Federal offense, and accordingly would not be a prior similar transaction. So we then go to the only other

theory that they contend for and that is to show that he has some relationship with Pedro Alvarez. And what did they have the witness testify to without cautioning him? They had him testify to dope. He has now described that as two different things, one hash hish and marijuana.

Number two, he has also testified that there was an exchange of guns for that dope, which would be another Federal criminal offense because of the failure to appropriately transfer or register the guns and go through the Federal formalities in that regard. It is just inconceivable that the Government would take this kind of an attack.

They established he knew Alvarez. He identified him -- although with a blue shirt, he sits there with a white shirt, but otherwise identified him, and they had any number of things that they could have asked about how he is able to identify him, whether he knew him in the community, but they go to a specific criminal act that has a point in time of at least four years or approximately four years prior to the incident we are concerned with.

The thing - - the man talks about conspiracy. Conspiracy to import marijuana. They are saying they want to show they had some criminal relationship before. Paint my client with a black picture before this Jury, attack his character before he has even had a chance to take the witness stand and say it doesn't mean anything. It is just to show that these two people have some contact together.

Judge, I didn't come prepared to argue this specific legal issue, uh, not knowing that the Government would take this approach and, therefore, I am left without any law to cite to Your Honor at this particular juncture but I would certainly like the opportunity to do that. I think that the -- in fairness to the Court and certainly, at least, to the Court if not to the defense counsel, knowing that

how they were going to proceed you would have expected a memorandum or something from the Government counsel that would raise the issue either in advance of trial, or at the outset of the trial so that we could have appropriately dealt with it. Here everybody is caught, and now I have to ask for a brief adjournment, it is coming on towards lunch time, maybe to deal with a particular issue, you know, predicated upon some cases.

(Pause.)

THE COURT: Well, let me put this in some context. Make a proffer, Mr. Hogue, as to what you expect to further adduce from the witness with respect to his relationship with the Defendant, Alvarez, up to January of 1972, which is the date of commencement of the conspiracy as alleged in this case.

MR. HOGUE: Your Honor -- alright, sir, Your Honor. We will submit -- we will proffer, rather, that the evidence will show that as a result of this early association, beginning possibly in 1968, or 1969, in March, that the coconspirators, we submit, Mr. Alvarez and that witness, became so involved that at the time of the, uh, beginning of the conspiracy that the Grand Jury charges that Mr. Alvarez was so confident of Mr. Kilgore's abilities that he hired him as one of his right-hand men, and the evidence will further show, with proffer, that he acted for Mr. Alvarez as a guard of a large quantity of marijuana, and further that he was entrusted in collecting moneys from certain buyers in the Tampa area and that he collected large amounts of money, and that he -- which were subsequently turned over to Mr. Alvarez, and that he was paid for his services rendered, and he will proffer -- we'd submit, that he will testify that he was an employee of Mr. Alvarez.

MR. LEVINE: Judge, if I may, that is one of the problems of a proffer from counsel, they don't always neces-

sarily come up to what the witness says. But I submit if we take what Mr. Hogue says, he hasn't even suggested that there was any continuity in the criminal relationship in dealing in marijuana. I would submit to Your Honor that his testimony about collection of money and payment as an employee all comes After January 1, 1972. He hasn't even suggested to you in his proffer that this man ever acted as an employee, collector, distributor, or armed guard of marijuana prior to January 1, 1972. And I assume Mr. Hogue being a knowledgable prosecutor that he presented his proffer in a light most favorable to him, and he doesn't have anything. He has got a singular transaction where this man bought in exchange for guns marijuana, or dope from my client. He doesn't even suggest that there is a continuity in that relationship, or there was anything that was a part of the conspiracy that spills over to the prior relationship.

Now if as a matter-of-fact, Kilgore had been involved in an importation with my client at an earlier period of time, then there may well be some similar transaction, some showing of relationship. He doesn't even suggest that. And I was going to object to him making the proffer and have the witness say it, but even if we take his words, there is no continuity there at all even this kind of singular relationship of buying and selling marijuana in that context.

He doesn't talk about being an employee and collecting money. I'd submit to Your Honor that if Mr. Hogue were called upon to respond directly as to the period of time involved, he would have to tell Your Honor, candidly, that is the period of time involved in the conspiracy. Not during any prior period. So that is what we are dealing with here. We are dealing with a totally different relationship between these people in a light - - presented in a light most favorable from this witness.

There was a relationship that he was a user and buyer of marijuana, not knowing where it came from, whether Alvarez grew it in his back yard or where it came from, and then all of a sudden a totally different relationship, according to the proffer, that existed and started and ended in about January of 1972. That doesn't give him a right to bring in the totally unrelated different relationship that existed prior thereto, particularly in the context of the significant prejudicial effects particularly in the language of this witness. Who could ever forget those words?

THE COURT: Alright. Do I understand that each of the other Defendants have likewise moved for a mistrial, or in the alternative for severance?

MR. GRABER: That is correct.

MR. CAMPBELL: That is correct.

MR. LEVINSON: Your Honor, the Defendant, Wells, has done both.

THE COURT: Pardon?

MR. LEVINSON: We've moved for a mistrial and severance.

MR. CAMPBELL: Same thing.

THE COURT: That is what I asked, Mr. Levinson.

MR. LEVINSON: Yes, sir. I just wanted to make it clear that I don't know that it is an alternative position on our part.

MR. GRABER: If Your Honor please, I perhaps did not so state at the time I made my motion, but I would ask for a mistrial and severance in this matter, and that was my intent.

THE COURT: Alright. My principal concern with respect to the response of the witness as manifested by the discussion at side bar was the witness' use of the term, "dope", which is obviously to me at least and to my knowledge an ambiguous term which would usually be as-

sociated more with, perhaps, heroin, or other controlled substances than with marijuana.

It is my understanding, however, that the witness will clarify that remark to say that he is referring to marijuana transactions with the Defendant, Alvarez, that he said that he had at or subsequent to 1968.

As a consequence it seems to me particularly given the nature of opening statements of all counsel at this early stage of the proceeding that the testimony is admissable under Rule 404-B of the Rules of Evidence with respect to the Defendant, Alvarez. Obviously not at this point admissible insofar as the other Defendants are concerned, and the Jury, of course, will be so instructed with the usual so called, "Apollo" instruction in that respect, but subsequent to those comments the motions for mistrial and the motions for severance of each Defendant are denied.

Marshall, return the witness to the stand and as soon as that is done seat the Jury.

(Thereupon, the witness was seated.)

(Thereupon, the Jury was returned to the Courtroom.)

THE COURT: Thank you. Be seated, ladies and gentlemen.

Now the last answer given by Mr. Kilgore to counsel's question before my conference with counsel and my request that you retire to the Jury room of course should be received and considered by you only with respect to the Defendant, Mr. Alvarez, at this point in time and, of course, is entitled to receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence to be adduced before you in the trial of this case.

In addition to those comments, however, there is certain instruction that I wish to give you that would apply to that as well as subsequent testimony and evidence

that will no doubt be received during the trial of this case, and it has to do with the nature of the offense alleged in the indictment. As you know and have been told repeatedly, the offense alleged is one of conspiracy to violate certain laws of the United States. Now a conspiracy under the law is a combination or agreement of two or more persons to join together to attempt to accomplish the same unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or to disregard the law.

I will, of course, give you additional instructions at the end of the trial concerning the law of the conspiracy, but there are some principals as I have mentioned which you should know at this time concerning your consideration of the testimony and evidence presented during the trial.

With respect to the conspiracy offense that was alleged in the indictment, you should first determine from all of the testimony and evidence in the case to be adduced before you whether or not the conspiracy existed as charged in the indictment. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the particular Defendant then under consideration willfully became a member of such conspiracy at or about the times alleged in the indictment.

In determining, however, whether a particular Defendant was a member of an alleged conspiracy, if any, the Jury should consider only that evidence, if any, pertaining to his own acts and statements. He cannot be bound by the acts or statements of other alleged participants until it is established beyond reasonable doubt, first, that a conspiracy in fact existed as alleged in the indictment and, second, from evidence of his own acts and statements that the Defendant under consideration

was one of its members.

So until that has been determined that a conspiracy existed and that the Defendant under consideration was one of its members, evidence of any statement made, or act done by another person may not be considered as evidence against the Defendant under consideration who is not present and did not hear the statement made, or see the act done.

On the other hand, if and when it does appear if it should so appear beyond a reasonable doubt from all of the evidence in the case that a conspiracy did exist as charged and that the Defendant under consideration was one of its members, then and only then the statements and acts thereafter knowingly made and done during such conspiracy and in furtherance of its objects by any other proven member of the conspiracy may be considered by the Jury as evidence against the Defendant under consideration even though he was not present to hear the statements made, or see the acts done.

This is true because as stated earlier a conspiracy is a kind of partnership so that under the law each member is an agent or partner of every other member, and each member is bound by, or responsible for the act and statements of every other member when made in pursuance of their unlawful scheme and during its continuation.

Now, Mr. Hogue, you may continue with your examination of this witness.

MR. HOGUE: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUING

BY MR. HOGUE:

Q Mr. Kilgore, you had testified that you and Mr. Alvarez traded guns for dope. Would you tell the Jury what you mean by, "dope"?

A By, "dope", I meant that we traded for marijuana and hashhish.

Q Alright.

A I had the guns and he had the marijuana and hashhish, and I would trade him the guns for that.

THE MARSHALL: All rise.

This Honorable Court is again in session.

Be seated, please.

MR. HOGUE: Court please, I have just turned over to all counsel what we believe to be a statement, a handwritten statement, of Randy Kilgore that we have just found as being a part of the old Geders case, uh, there is also transcription found with it, and we have photostated both and turned them over to counsel.

THE COURT: Very well, Mr. Hogue.

MR. HOGUE: I believe all counsel has copies.

MR. CAMPBELL: I don't have the - -

MR. HOGUE: And - - I'm sorry. If the Court please, here is the original. If counsel would like to examine them - -

MR. CAMPBELL: We may have to, because I can't read half - -

MR. LEVINE: No, no, that's - -

THE COURT: I think what counsel meant, Mr. Campbell, was that he has the original handwritten if anybody wishes to compare it with the typewritten transcription is what he was talking about.

MR. CAMPBELL: I thought they were two separate documents.

THE COURT: Maybe I misunderstood. The typewritten is a transcription of the handwritten.

MR. HOGUE: No, sir, you understood correctly.

MR. CAMPBELL: Thank you.

THE COURT: Alright.

MR. LEVINE: Judge, although this is a rather brief statement, it is a rather significant one, because it is dated November 1971 and talks about the transaction that he said occurred in 1972. I am going to need some time to evaluate it. I don't know how he can make a statement in 1971 - - November of '71 about a '72 transaction.

THE COURT: Let me see the material.

(Pause.)

Alright, Mr. Heizerling.

* * *

MR. LEVINE: Judge, could we get some information on this Jencks Act statement of the witness that I have just been handed? It has been produced by Government counsel. And if I understand correctly, this is a statement - - the entirety of this statement is in the witness' own hand?

THE COURT: That was my understanding which counsel says they just discovered themselves in the file pertaining to the Geders case is what, uh - -

MR. HOGUE: Your Honor, to be more specific, it was a - - found in the U.S. Attorney's file on the Geders case today.

THE COURT: Is the Geders case - - when counsel uses that term, are they talking about number 73-69?

MR. HOGUE: Yes, sir. Yes, sir, that is the case. There were actually two trials.

THE COURT: As far as you know, it is a statement in response to counsel's question in the witness' own handwriting?

MR. HOGUE: We believe it to be. The witness has never seen that statement, like I say. I just saw it myself. But I can represent to the Court that I now have to conceive that this is his handwritten statement. If it's not, the witness may deny that.

MR. LEVINE: Judge, can we make a voir dire examination of the witness very briefly out of the presence of the Jury so that we wouldn't be - - Government counsel is of the impression - -

THE COURT: Well, I agree under those circumstances, if it is tendered as Jencks Act material, as it most certainly should be, given its content, and if it is in the

handwriting of the witness himself, on the other hand, I don't think counsel ought to be mislead by being given something which is Jencks Act material only to have the witness deny it unless he can call on Government counsel to impeach it or - - you see what I mean?

MR. HOGUE: Yes, sir, I do understand, and I want to make it clear that we have - - we had just found this statement ourselves, and we have never shown it to this witness.

THE COURT: I understand, and that is quite proper because I've instructed Government counsel at this point not to discuss the case with the witness.

Have the witness come in. Leave the Jury in the Jury room.

THE MARSHALL: Yes, Your Honor.

THE COURT: Hand me the original.

(Thereupon, the witness was brought into the Courtroom.)

THE COURT: Mr. Heizerling, hand this document to Mr. Kilgore, please.

THE CLERK: Yes, sir.

THE COURT: Mr. Kilgore, look at that document if you would that I've just asked the Clerk to hand to you.

Have you seen that before?

THE WITNESS: Yes, sir.

THE COURT: Is that your handwriting? Is that a document you, yourself prepared?

THE WITNESS: Yes, sir.

THE COURT: Alright.

Let it be marked as Court's Exhibit next in sequence.

MR. LEVINE: Judge, in light of that response, I would then have it marked as Defendant's, Alvarez, if I may, exhibit, because I am going to want to make inquiry of the witness about the document and show it to him.

THE COURT: Well, alright. Let it be marked in that

fashion.

Seat the Jury, Marshall.

THE CLERK: Defendant's, Alvarez, Exhibit Number Eighteen for identification.

(Thereupon, the Jury was returned to the Courtroom.)

* * *

Q Now, Mr. Levine had asked you some questions regarding a written statement that you made, or done, Defendant's Alvarez, Eighteen. Is that correct?

A That is correct.

Q Does the name, "Jerry Massler," appear anywhere in that document?

(Pause.)

A No, sir.

Q No, sir? Is that what your answer was? I'm sorry, I wasn't facing you.

A Sir?

Q What was your answer? I didn't hear you.

A Your - - was Massler? No, sir, he wasn't.

Q Was the trip to Mr. Massler's home on the first trip to New York mentioned in that document?

A No, sir.

Q Was the second trip to New York mentioned in that document?

A No, sir.

Q Was Mr. Massler mentioned by description in any manner, shape or form in that document?

A No, sir. It is a very brief document.

Q No details; is that correct?

A Yes, sir, that is correct.

Q No details like you made $500.00 a week guarding the stash house?

A What are you asking?

Q Was that in that document?

A Yes, sir.

Q Isn't that a detail?

A I guess it depends on how you look at it.

MR. HOGUE: Objection, Your Honor.

MR. GRABER: I'll withdraw it.

MR. HOGUE: Argumentative.

THE COURT: It is withdrawn.

BY MR. GRABER:

Q When did this trip to Columbia take place, sir?

A In April of '72.

Q Of '72.

Are you sure of that?

A Yes, sir.

Q Isn't it a fact that in that handwritten document of your's, you indicated that the trip took place a week or two after Christmas?

A It may say that, I don't know. I didn't - -

Q Well, would you look?

A Alright.

(Pause.)

Sir, I don't see it in here.

Q Alright. Isn't there a statement there that we - - that a week or two after Christmas Pedro and Scott said they would pay you to ride the plane down to Columbia to pick up marijuana?

A Yes, sir.

Q And isn't that when you went to Columbia?

A No, sir.

Q And do you recall that conversation a week or two after Christmas?

A There wasn't a conversation.

Q In other words, that which you put down, uh, sometime in the past was incorrect?

A That is correct.

Q And you wrote it in your own hand?

A Yes, sir.

Q And you wrote it at the request of law enforcement officials?

A Yes, sir.

Q And you wrote it at the request of law enforcement officials and you wanted to be truthful with them?

A Yes, sir.

Q And you are saying that that is not true?

A That is correct.

Q You are saying - -

A I'm not saying - -

Q You are saying that is a lie, sir?

A I'm not - - to your other question I'm not saying that that is an intentional mistake.

Q Well, sir, to go back, do you have any recollection of - - at all of when you wrote this?

A No, sir.

Q The date that appears thereon is November of 1971. Does that aid you in your recollection?

A No, sir, it doesn't. That doesn't mean that is the date I wrote it.

Q Well, what does that mean?

A I have no idea why that date is on there.

* * *

THE MARSHALL: All rise.

This Honorable Court is again in session. Be seated, please.

THE COURT: Good morning, counsel. Ready to proceed?

MR. GRABER: Yes, Your Honor.

THE COURT: Alright. Marshall, ask the witness to come - -

MR. LEVINE: Your Honor, if I may, please, Mr. Graber has indicated to me that he plans on offering in evidence, uh, the November, '71 statement of Kilgore. I forget the - - it is Defendant Alvarez Exhibit Number

Eighteen.

On behalf of my client, since it does mention my client and name him and detail him, I would specifically object to that item as an evidentiary item going before the Jury.

It is obvious why Mr. Graber wants it, because it doesn't mention Mr. Massler, but it specifically mentions my client, and as an evidentiary item, since the Jury would have it to go back into the Jury room with as all other items of evidence in, I would specifically object to it. And if Your Honor is inclined to admit it, I would ask for a severance of my client from this proceeding.

I mean, it is clearly exculpatory as it relates to Mr. Massler and inculpatory as it relates to my client, and that is the dilemma that each of us obviously has; one attempting to keep it out, to talk about it ourselves, and the other attempting to put it in, that being Mr. Graber, obviously.

THE COURT: Well, it is your intention to offer it, Mr. Graber, as suggested by counsel?

MR. GRABER: Yes, Your Honor. It is the first thing I intend to do this morning. It is clearly exculpatory as to Mr. Massler. It also is a statement that I believe is a detailed statement of the - - in relation to the testimony that he gave in this trial. If Your Honor will recall that he had indicated that this was only a brief summary of the events. I think the - - uh, the statement itself would speak for itself as to its great detail, including landing at Lakeland, making phone calls, uh, uh, then re-landing at Zephyrhills, etcetera. It is a very detailed statement. It does contradict the witness' testimony vis-a-vie my client, also contradicts his testimony in Court as it being just simply a general summary. And it does totally exculpate Mr. Massler. And, of course - -

THE COURT: Well, under Rule 801-D, it would not be

hearsay. If it is, in fact, inconsistent with the witness' testimony at trial, and I'll have to examine the exhibit in order to make that determination and reserve ruling on the offer.

MR. GRABER: The Clerk has it in his hand, Your Honor.

THE COURT: Alright.

MR. LEVINE: Your Honor, if I may - -

THE COURT: Let the record show that it has been offered and that the Court is reserving ruling pending a study of the exhibit.

* * *

MR. GRABER: Your Honor, before we proceed with another witness, I do have a offer of evidence, uh, Defendant Alvarez Exhibit Eighteen, which I would like offered as Massler's One in evidence. Your Honor did reserve decision.

THE COURT: I understand, Mr. Graber and - - I have reserved a decision, and I am going to look at it during the recess.

Did I understand there was objection, Mr. Levine?

MR. LEVINE: Yes, sir. As it relates to the Defendant Alvarez, uh, it specifically refers to him on at least one occasion, if not more, so we feel that it is prejudicial to - - as an evidentiary item. In a separate trial, if Mr. Massler were on trial separately, he may be able to admit it to show that there is no reference to him, but in these proceedings since my client's name is mentioned and the Jury will have that document before them in the Jury room, we submit that it would highlight and emphasize his activities and participation - -

MR. GRABER: If Your Honor pleases, if Your Honor will recall the testimony of Mr. Kilgore regarding this particular document, he said it was general in nature. As an explanation to why Mr. Massler's name nowhere appears on this particular document, I would submit

that what is general in nature may be open to interpretation and certainly cannot be handled through cross-examination of the witness whose interpretation may be different from mine, or the Jury's. And I would submit to Your Honor that this particular document should be shown the Jurors so that they themselves can determine whether or not there was not a detailed statement of an event in which my client is in no way involved in this particular situation described in Alvarez's Eighteen or proposed Massler's One.

THE COURT: Alright. What is the Government's position with respect to this Exhibit?

MR. HOGUE: Your Honor, we would object to the admission of it. As I understood counsel's reasoning for wanting to move it in evidence, it was for impeachment purposes, uh, and it was exculpatory in nature he claims because his client wasn't mentioned. But now he had the opportunity and did examine the witness in connection with the statement, and the best - - the best evidence - -

THE COURT: Write this down, Mr. Hogue. Write this down. During the recess examine Rule 613-D in relation to 801-D 1-A and 612.

MR. LEVINSON: Judge, for purposes of the record we would like on behalf of Mr. Wells to also object to the admittance of that statement. If anybody is prejudiced by the admittance of that statement, I would submit the Defendant Wells and perhaps Rice are. It makes referrence to them in innumerable times. It details the first proported April trip to Columbia with Rice and Wells.

THE COURT: I'll examine the statement myself, which I've not yet had a chance to do, in order to more intelligently rule on both the proffer and the objections. We'll be in recess for fifteen minutes.

* * *

THE COURT: Which I did make and I admitted those exhibits at that time.

Is the government - - what's the government's position on, uh, Defendant Massler's proffered Exhibit Number One?

MR. HOGUE: Your Honor, I guess we will withdraw the objection that we have had as to it.

THE COURT: You object, Mr. Levine?

MR. LEVINE: Yes, sir, and I object and I would urge the Court - - the reasoning the Court gave in precluding Mr. Levinson from writing on the chart in aspect of the witness' testimony, to emphasize the witness' testimony, meaning Mr. Levinson sought to write a question and then when the witness responded to the answer as to mileage or miles, Your Honor said, you can't do that because it's taken out of context and placing undue emphasis on an aspect of testimony that the jury is suppose to generally recollect. That particular document is a limited portion of Mr. Kilgore's testimony that is in written form and the jury is going to be able to take that back to the jury room and read it as opposed to relying on their recollection and it's highly prejudicial to my client and puts him in the middle of a conspiracy through the written information and that — it would tend to emphasize and corroborate testimony and I submit as a prior similar statement, they could ask - - conceivably ask him some questions about it but the document itself is not admissible even if the government sought to rehabilitate their witness in that fashion. The fact that we're all here on trial and the fact that it's in part exculpatory to Mr. Massler but incriminatory to my client obviously creates the dilemma. If we were on trial without Mr. Massler there would be no question about it coming in and it's only Mr. Massler who seeks to offer it and all the other Defendants who are named

object to it because of the significant prejudice which it bears.

No instruction to the jury would instruct the jury to not consider the item of documentation evidence which they take back to the jury room as to the guilt or innocence of my client.

MR. LEVINSON: I have an additional factor to add to Mr. Levine's objection. Mr. Wells' name is mentioned in that document, if not once, more than once. The prejudicial fact of the date and the purported events as described by that document, compared to the testimony elicited from Mr. Kilgore would far out-weigh any probative value the document might have. In addition thereto, if you recall the cross examination,- - I'm sorry, the direct examination of Mr. Kilgore by Mr. Hogue, he at that time, with the Court's permission, had full and ample opportunity to elicit from Mr. Kilgore the information contained on that document.

THE COURT: Well, it's offered by Defendant Massler, as I would understand it, though he has not specifically so stated. Pursuant to the provisions of Rule 613D of the new rules of evidence, because it's only pursuant to that provision of the rules that I can see it would be admissible when offered by that Defendant. It's hearsay to the other Defendants surely under Rule 801D as that particular rule was amended by the Congress prior to the adoptions of the rules and to my mind there is some ruling inconsistency or at least ambiguity and uncertainty in relationship of Rule 613 and 801 as a consequence. I think - - I think the objection of Mr. Levine would be well taken under ordinary circumstances but when it's offered by Mr. Graber from Mr. Massler, I think it's admissible under 613B, to the extent that it would be inconsistent, given the added circumstance that the Witness Kilgore was cross examined at length

by Mr. Levine with respect to the statements contained in the exhibit with particular reference to the date that appears on it, among other things, and the government's withdrawal of the objection that it previously announced, and it seems to me on balance, renders the document admissible under 613B and given the government's position, 801D1B, and I'll overrule the objections that have been stated and receive the exhibit in evidence. It should be remarked as Defendant Massler's Exhibit Number One, having previously been identified as Alvarez's Exhibit Number Eighteen.

MR. CAMPBELL: We'd like the Record to show specifically that the Defendant Rice objects to the document.

THE COURT: That's over the objection of all Defendants and all grounds previously stated other than, of course, the offering defendant, Mr. Massler.

MR. LEVINE: If Your Honor please, did I understand in the context of your reference to the last rule and the position of the government, is Your Honor viewing this as an offer on the part of the government also as a prior consistent statement?

THE COURT: No, they've not offered the exhibit.

MR. LEVINE: Okay, and that's why I wondered, the reference to the last rule in that context.

THE COURT: Only to demonstrate my train of thought to the extent that it would admissible if offered by the government even over your objection, under that provision of the rule and therefore it's admission on the proffer of the Defendant Massler without objection by the government, it seemed to me, uh, renders the objection that might otherwise be by you as you have made it on hearsay grounds, not well taken.

MR. LEVINE: Your Honor, in light of the ruling of the Court, the Defendant Alvarez would move for sev-

erance.

THE COURT: The Record will so reflect and I'll deny the motion.

MR. CAMPBELL: And the Defendant Rice.

THE COURT: All Defendants moving for severance, each from the other, and mistrial, if I understand it?

MR. LEVINE: Yes, sir.

THE COURT: The Record will so reflect and those motions will be denied.

We'll be in recess for lunch until 1:30.

MR. LEVINSON: One more thing - -

THE COURT: We'll be in recess until 1:30.

MR. LEVINSON: Okay, Judge.

THE MARSHALL: All rise. Court will be in recess until 1:30.

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
vs.
PEDRO ALVAREZ, ET AL. No. 75-181-CR-T-H

ADDENDUM CERTIFICATE

I further certify that counsel for the defense, Arnold Levine, Esq., wishes to note the following correction in the trial transcript of proceedings:

Page	Line	
1680	3	Corrected to read as follows: No instruction to the jury would cure the prejudice, and I would ask the Court to instruct the jury not to consider the item of documentation evidence which they take back to the jury room as to the guilt or innocence of my client.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this, the 6th day of August, 1976.

STATEMENT OF RANDY KILGORE

November, 1971

Pedro Alvarez came to my house and asked if I would guard some pot for him and Scott, for $500 a week. I took the offer. That night Scott & Pedro picked me up at my apartment on Stroud and we went to a stash house on Wayne Road, off of Gun Highway. I weighed pot and took money while I was there. There was two other people there. Dale Lester and a kid whose name I don't remember from some Bible School in St. Pete. About a week or two after Christmas Pedro and Scott said they would pay me to ride the plane to South America and pick up the next load for them. I went to the Hawaiian Village on Dale Mabry with Paul Rice and John Wells. There we rented two rooms. That night Mike Fink and Mike Durst came to the rooms. We talked for awhile and they left. The next morning at 5:00 a.m. we left the Hawaiian Village and stopped at a convenience store for cokes and beer and stuff on the corner of Rome and Sligh. From there we went to Zephyrhills Airport.

John and Paul told me they told Pedro he was crazy to rent the plane for $10,000 so now he had bought it for $10,000. We then left for the Bahamas. We stopped at one place in the Bahamas, I think at Inagua. They would not give us fuel for the plane so John or Paul bribed the gas man so he would meet us the next morning. The next morning we left for South America. As we reached South America Paul pointed out Santa Marta on the right beyond some mountains. We flew over some large highway and landed on a dirt runway which was explained to have been built by U.S. Aid bulldozers.

Pedro Devila was there with fuel and pot waiting for

us. We fueled the plane. Then I helped load the pot. Pedro Devila had a AR 180 which Alvarez had given him. He had the wrong kind of ammo in it and he thanked me for telling him. He asked if I could get him any fully auto rifles and we talked guns for awhile. We left and headed back to the U.S.

The plane was giving a weird vibration and Paul said one of the props must have hit a rock while taking off the dirt runway. There were six 55 gal. drums of gas on the plane with a hand pump. Paul said that would allow us to fly back nonstop to Zephyrhills. We landed at Lakeland Airport.

John left the plane to call Zephyrhills and see if it was Okay to come on in. He came back to the plane and told us he couldn't get an answer. We left Lakeland and headed for Zephyrhills. Landed and John and Paul left the plane (I will still in it) got in their truck and left. A police car came to the chain at the airport, then he left. Pedro Scott, Mike Sarga, Sparky Yee came up in a Wenaloyd Camper and we unloaded the pot into it. I went in the head car with Pedro and the camper followed us. We went to Riverview to Wayne Heckett rented trailer. Unloaded some pot there. Then Scott drove me back to my house.